

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)**

Docket No. 16–CRB–0001–SR/PSSR (2018–2022)

MUSIC CHOICE SCHEDULING PROPOSAL FOR REMAND

Music Choice hereby respectfully submits its proposal, pursuant to 37 C.F.R. §351.15, for the conduct and schedule of the resolution of the remand in this proceeding.

I. SCOPE OF REMAND

On appeal, the D.C. Circuit vacated only two discrete sections of the Final Determination in this proceeding. First, the court ruled that because Music Choice was, in fact, offering its subscription digital audio service over the internet on and before July 31, 1998, the Register of Copyrights and Copyright Royalty Board erred by ruling that Music Choice’s internet transmissions made today are categorically excluded from the “unconditional” grandfathered PSS rate – what the Register and the Board referred to as the “existing service offering” category. *Music Choice v. Copyright Royalty Board*, 970 F.3d 418, 425-27 (D.C. Cir. 2020). Consequently, the court vacated Part V of the Final Determination, in which the Board determined that internet transmissions by a PSS, to the extent they are received by subscribers outside of their homes, are excluded from the PSS license. *Id.* at 430.

Second, the court vacated Part XI(A)(3)(g) of the Final Determination on the grounds that the Board's changes to the PSS "defensive audit" provision were: (1) inconsistent with the Board's prior ruling on the same issue without providing a sufficient justification or basis in the record for changing that position; (2) otherwise unsupported by record evidence justifying the changes; and (3) made without consideration or regard for the policy reasons behind the CARP's original implementation of the defensive audit provision or Music Choice's established reliance interest in that provision, which had been in place for 20 years. *Id.* at 429-30. No other portion of the Final Determination was appealed. Thus, the scope of this proceeding on remand is limited to these two narrow issues.

II. CONDUCT OF PROCEEDING ON REMAND

With respect to remand of the defensive audit provision, this issue was directly litigated during the proceeding and both participants offered testimony and argument directly on the vacated changes to the regulation, which were specifically proposed by SoundExchange. Consequently, Music Choice does not believe new testimony or evidence on this issue should be taken during remand. With respect to the reconsideration of whether any of Music Choice's internet transmissions of its audio service fall outside the scope of the PSS license, Music Choice respectfully suggests that additional testimony and other evidence is necessary. Unlike the vacated changes to the audit regulation, no participant ever requested the changes to the regulations that exclude internet transmissions received outside the home from the scope of the license. Consequently, no participant had the opportunity to directly address the issue, or to introduce testimony or other evidence directly on point. Instead, the Board felt the need to interpret certain documentary exhibits without the benefit of explanatory testimony from knowledgeable witnesses, which would have clarified the significance of those documents and

put them in the proper context. Indeed, under similar circumstances the Board has decided to simply withdraw its own *sua sponte* regulatory changes rather than re-open the proceeding at an advanced stage when the parties had not had the opportunity to address the changes while the record was open. In the Web IV proceeding, after the close of the record the Board initially considered *sua sponte* a new rate structure that for the first time would differentiate between different categories of music copyright owners. None of the participants, however, had asked for such a structure during the proceeding and therefore had not submitted testimony directly on that point. Ultimately, recognizing the need for additional testimony and evidence on that point, the Board decided to abandon its proposed regulatory changes. In doing so, the Board noted:

. . . the Judges acknowledge that interpretation of the evidence out of context and without adequate input of the parties would be capricious. Moreover, reopening the proceeding at this juncture, long after the closing of the record pursuant to 37 CFR 351.12, for further evidence and argument on this issue would be improper. The Judges, therefore, do not resolve the legal issue they referred to the Register and do not set rates in this proceeding that distinguish among classes of copyright owners.

Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 FR 26,316 at 26,319 (May 2, 2016). With this remand coming more than three years after the closing of the record in SDARS III, it would certainly be within the Board's authority to simply strike the two changes to the prior regulatory language vacated by the D.C. Circuit.

If, however, the Board chooses to reconsider the issue of Music Choice's internet transmissions, the parties must be allowed to introduce additional evidence and argument on that point. In such an eventuality, Music Choice respectfully suggests that a process be employed wherein Music Choice and SoundExchange submit written direct remand cases, limited to the internet transmission issue covered in Part V of the Final Determination, followed by a short

discovery period if necessary, then written rebuttal cases with another short discovery period and a hearing limited to this supplemental testimony and evidence. Post-hearing briefing and/or proposed findings of fact and conclusions of law would then be filed, limited to the subjects of Part V and Part XI(A)(3)(g) of the Final Determination. Based upon existing guidance from the D.C. Circuit and other sources, Music Choice respectfully suggests the Board could decide the internet transmission issue without another referral to the Register. The proposed schedule below therefore does not include such a referral. If the Board comes to a different conclusion, however, Music Choice respectfully suggests that the dates below be changed such that Written Direct Remand Statements are not filed until at least 45 days after the Register issues a ruling on that referral. Music Choice does not anticipate many witnesses or exhibits due to the narrow scope for which the record should be reopened. Given the uncertainties at this point, however, Music Choice respectfully suggests that the scheduling of the hearing and any post-hearing submissions be taken up at the initial pre-hearing conference.

III. PROPOSED SCHEDULE

Written Direct Remand Statements due	02/26/2021
Commence written direct remand discovery	03/08/2021
Exchange documents on which WDRS are based	03/08/2021
Exchange document requests and interrogatories	03/15/2021
Exchange written objections and responses	04/05/2021
Produce documents and interrogatory responses	04/16/2021
End of direct remand discovery	05/07/2021
Written Rebuttal Remand Statements due	06/18/2021

Exchange documents on which WRRS are based	06/25/2021
Exchange document requests and interrogatories	06/30/2021
Exchange written objections and responses	07/09/2021
Produce documents and interrogatory responses	07/23/2021
End of rebuttal remand discovery	08/13/2021
Initial pre-hearing conference	08/20/2021

Dated: November 27, 2020

Respectfully submitted,

/s/ Paul Fakler

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Proof of Delivery

I hereby certify that on Friday, November 27, 2020, I provided a true and correct copy of the Music Choice Scheduling Proposal for Remand to the following:

American Federation of Musicians of the United States, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

Recording Industry Association of America, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Sony Music Entertainment, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

SAG-AFTRA, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Warner Music Group, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

American Association of Independent Music ("A2IM"), represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

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Signed: /s/ Paul Fakler